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Articles

A Proposed Right of Conscience for Government Attorneys

RALPH NADER* & ALAN HIRSCH**

Imagine a new attorney with a highly developed civic consciousness. She dislikes the prospect of serving as a hired gun, because she does not want to do work which violates her perception of the public interest. Is she likely to choose private practice or government employment?

Paradoxically, this public-spirited attorney might well opt for private employment, where "American lawyers have long claimed the right to select clients in accordance with their conscience."¹ The American Bar Association officially endorses this right.² In the private sector, a lawyer can either work for herself, or in a partnership, and take on whatever causes and clients she wants.³ Or she can work for a law firm which will allow her to turn down assignments she finds distasteful.⁴ By contrast, if

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1. Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635, 635 (1997).

2. The Comment to Rule 6.2 of the American Bar Association's MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter MODEL RULES], which have been adopted, with some modification, by the bar associations of forty states, declares that "[a] lawyer ordinarily is not obligated to accept a client whose character or cause the lawyer regards as repugnant." (The one partial exception, court appointments, is discussed *infra* text accompanying notes 34-42.)

3. See L. Harold Levinson, "So You Want to Sue the President?" *A Pre-Engagement Letter to a Would-be Client, with Comments on a Law Firm's Freedom to Select Clients and Causes*, 25 W. ST. U. L. REV. 211, 248-49 (1998) (noting that in America, unlike England, attorneys feel free to decline to represent prospective clients); MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 66-70 (1990) (noting that duty of zealous advocacy applies after an attorney has accepted a client, but does not require attorney to accept any particular client).

4. Although law firms are legally free to dismiss attorneys who decline a particular assignment, as a practical matter consideration of law firm morale and profitability renders it unlikely that firms will not accommodate a lawyer's claims of conscience. Firms can always find another lawyer to take on a particular assignment, and do not wish to discourage or lose lawyers unnecessarily. See Levinson, *supra* note 3, at 212 ("[A] law firm should respect and if possible accommodate the diverse opinions and comfort levels of its members.").

she opts for government employment, she forfeits any right of conscience. She may lose her job if she declines an assignment.

This can happen even at the very top of the legal ladder, as illustrated by President Richard Nixon's dismissal of Attorney General Elliot Richardson for refusing to fire the special Watergate prosecutor. This example, while particularly infamous, is hardly the only instance of a government attorney discharged for following his conscience.⁵ And there is no calculating how many others have compromised their consciences for fear of discharge or other disciplinary action.

This Article argues for enactment of a statute or ethical canon protecting a government attorney's right of conscience.⁶ Part I discusses the special role of the government attorney as articulated by courts and commentators, and shows how in practice this conception is compromised. Parts II, III, and IV discuss a range of circumstances in which courts and legislatures protect the conscience of private attorneys, other employees, and citizens generally, without creating havoc in the workplace or society. Part V proposes a specific vehicle for extending such protection to government attorneys.

For some reason, the conscience of the government attorney has been neglected—in both theory and practice.⁷ This Article proposes a remedy for a problem that has been ignored for too long.⁸ Recognizing a right of conscience of government attorneys would promote the pro-

5. See *infra* text accompanying notes 23–33.

6. There is some literature on the ethics of government attorneys, see, e.g., Catherine J. Lancot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951 (1991), but it does not address a government attorney's obligation to accept assignments that collide with his conscience.

7. See *id.* at 952–53 n.3 (noting that, in general, “government lawyers are the group whose ethical responsibilities have been most neglected by scholars and the organized bar”).

8. One commentator seemed primed to raise the issue. See Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987). This short essay pondered the hypothetical case of a Department of Education lawyer given a politically motivated assignment that he regards as unconstitutional. However, Miller stacks the deck by considering whether the attorney, having accepted the assignment, should take actions which undermine his agency's position. This course he rightly rejects, noting that “[i]f attorneys could freely sabotage the actions of their agencies out of a subjective sense of the public interest,” an ineffective government and distrustful public would result. *Id.* at 1295. See also Anthony Lewis, *Government Lawyers and Conscience*, 59 A.B.A. J. 1420, 1421 (1973) (arguing that government “could not operate if every lawyer employee took it upon himself to try to sabotage policies of which he disapproved”). However, the notion that we should not authorize sabotage does not mean we should not protect conscience. Miller notes in passing that the attorney “may have an easy out by requesting reassignment.” Miller, *supra* at 1294. He fails to consider that this is not always an easy out, see *infra* text accompanying notes 23–33, because a government attorney's right of conscience has not been acknowledged.

fessed ideals of the legal profession and help attract able and public-spirited attorneys to public service.⁹

I. THE GOVERNMENT ATTORNEY'S SPECIAL ROLE

It is a commonplace that the law is not a mere trade but a noble profession.¹⁰ Lawyers, as members of this inherently public and exalted profession,¹¹ and officers of the court, are held to a higher standard than members of other professions.¹² Within this select class, the government attorney is held to the highest standard.¹³ Unlike his counterpart in private practice, he is often said to have the public interest as a client¹⁴ and is admonished to "put loyalty to the highest moral principles and to country above loyalty to persons, party or Government department."¹⁵

The government attorney's special ethical responsibility is spelled out most often in the context of the criminal law. As the United States Supreme Court famously explained:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a

9. We ought to encourage the attitude of the government lawyer who can say, "I am immensely proud of the public service government lawyers perform." Douglas Letter, *Lawyering and Judging on Behalf of the United States: All I Ask for Is a Little Respect*, 61 GEO. WASH. L. REV. 1295, 1296 (1993). Such an attorney is surely justified in feeling that government lawyers are, as a group, "very different from their private sector colleagues, who usually practice law as a profession and as a business enterprise." *Id.* Needless to say, there are exceptions—attorneys in the private sector who are as public-spirited as the typical governmental attorney, and government attorneys who are basically bureaucratic time-servers.

10. See, e.g., *Mallard v. U.S. Dist. Ct. for S. Dist. of Iowa*, 490 U.S. 296, 311 (1989) (Kennedy, J., concurring) ("[O]urs remains a noble profession.").

11. The Preamble to the MODEL RULES declares that lawyers "play a vital role in the preservation of society" and have "special responsibility for the quality of justice."

12. See, e.g., *id.* ("Lawyers also have obligations by virtue of their special status as officers of the court. . . . [O]ur duties go beyond what the law demands."); *People ex rel. Karlin v. Clukin*, 162 N.E. 487, 489 (N.Y. 1928) (Cardozo, C. J.) ("[Lawyers are] received into that ancient fellowship for something other than private gain. He became an officer of the court . . . an instrument or agency to advance the ends of justice.").

13. See, e.g., *United States v. Pavloyianis*, 996 F.2d 1467, 1475 (2d Cir. 1993) ("[W]e normally ascribe a higher standard of professional and ethical responsibility" to government attorneys.); *Freeport-McMoran Oil Co. & Gas v. FERC*, 962 F.2d 45, 46 (D.C. Cir. 1992) (rejecting the "remarkable assertion at oral argument that government attorneys ought not be held to higher standards than attorneys for private litigants"); *United States v. Krebs*, 788 F.2d 1166, 1176 (6th Cir. 1986) ("United States Attorneys are 'held to a higher standard of behavior' than other attorneys.") (quoting *United States v. Young*, 470 U.S. 1, 25 (1985)).

14. See Preamble to MODEL RULES (stating that government lawyers "may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so"). See also *Elisa E. Ugarte, The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 270 n.3 (1999) ("[T]he goals of the representation of the government lawyer necessarily include pursuit of the public interest."); *Douglas v. Donovan*, 704 F.2d 1276, 1279 (D.C. Cir. 1983) ("[Government attorneys] have special responsibilities to both this court and the public at large.").

15. *Ugarte, supra* note 14 at 279 (quoting 5 C.F.R. § 1300 app. A (1995)).

case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. . . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.¹⁶

This assessment has been frequently cited by the courts¹⁷ and has "become ubiquitous on publications produced by and about U.S. Attorneys."¹⁸

All government attorneys are encouraged to think this way. Francis Biddle, Solicitor General under Franklin Roosevelt, maintained that the Solicitor General "is responsible neither to the man who appointed him nor to his immediate superior in the hierarchy of administration. . . . [H]is guide is only the ethic of his own profession framed in the ambience of his experience and judgment."¹⁹ One commentator notes that "often this perspective, to one degree or another, is held about the entire Department of Justice."²⁰ He further notes that United States Attorneys can be thought of as agents of the law itself: "bound to carry out its meaning."²¹

In light of the above, one might expect a government attorney to be protected when she declines an assignment she perceives as illegal or improper. Take the Supreme Court's insistence, quoted above, that prosecutors "refrain from improper methods calculated to produce a wrongful conviction." Surely then, a prosecutor must decline a case when he concludes that only improper methods can secure a conviction.²² And if pursuing such a case would violate his duty, surely he cannot be discharged for refusing to do so.

That might be what we would hope and expect, but the reality is different. Take the case of Alan Hyatt. Hyatt was an assistant city attorney in Minneapolis who refused to prosecute a case because he felt the police lacked probable cause to make the search that produced the only evidence. Accordingly, he felt "the case was not strong enough to win and would have been tossed out of court by a judge."²³ Hyatt was fired. The

16. *Berger v. United States*, 295 U.S. 78, 88 (1935).

17. It has been cited almost 200 times by the federal courts alone.

18. H.W. Perry Jr., *Government Lawyering: United States Attorneys—Whom Shall They Serve?*, 61 LAW & CONTEMP. PROBS. 129, 130 (1998).

19. FRANCIS BIDDLE, IN BRIEF AUTHORITY 97 (1962).

20. Perry, *supra* note 18, at 130.

21. *Id.* See also Letter, *supra* note 9, at 1297 ("In theory, federal public servants have a single master: the people of the United States.").

22. In a section dedicated to "Special Responsibilities of Prosecutors," Rule 3.8(a) of the MODEL RULES does call upon prosecutors to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."

23. Paul McEnroe, *Attorney for City Fired for Not Pushing Case*, MINN. STAR TRIB., Dec. 16, 1995, at B3.

discharge of this "popular and well-known attorney"²⁴ was a hot topic of conversation around the courthouse, with discussion "centered around why an attorney with so much experience was not allowed to use his discretion in considering the outcome of a case."²⁵

That same question was raised by the discharge of David Bristow, a "young rising star in the San Bernardino County district attorney's office."²⁶ Bristow refused to prosecute a "three strikes and you're out"²⁷ case that could have resulted in life imprisonment for a man charged with possessing less than a quarter of a gram of cocaine. When Bristow could not bring himself to try the case,²⁸ he expected it would merely be "reassigned to an attorney who could prosecute it with conviction."²⁹ Instead, he was fired.

Prosecutors are not the only government attorneys who can face the choice between their conscience and their job.³⁰ Just ask Ronald Andersen, an EEOC attorney in Phoenix for nine years who, during his work on a sexual harassment case, "uncovered a scheme to secure through bribes the false testimony of government witnesses to be presented at trial."³¹ After consulting both his conscience and the chair of the ethics committee of the Arizona State Bar Association, Andersen felt he had no choice but to prevent fraud on the court: He planned to advise the court of the misconduct and withdraw from the case. However, his supervisors forbade this course of action, and threatened retaliatory action if he took it. Andersen went ahead and did the right thing, then resigned. As his attorney explained: "Andersen was placed in the impossible situation of being [professionally] unethical as a lawyer or being insubordinate as an employee."³²

These signal cases—that happened to make their way to the newspapers or courtroom—are in fact only the tip of the iceberg: Numerous government attorneys, in a variety of circumstances, face the same untenable conflict. An Environmental Protection Agency lawyer may be

24. *Id.*

25. *Id.*

26. See Tom Gorman, *Lawyer Fired Over "3 Strikes" Switches Sides*, L.A. TIMES, Apr. 25, 1996, at A3.

27. CAL. PENAL CODE §§ 667(b)-(i), 1170.12 (a)-(d) (West 1999).

28. "It struck me as grotesque," he said. *Id.*

29. *Id.*

30. See, e.g., Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under Bivens*, 88 GEO. L.J. 65, 68 (1999) ("[G]overnment lawyers who defend *Bivens* actions behave more like 'hired guns' . . . and less like public servants who would also take into account the broader public interest . . ."). A *Bivens* action is a lawsuit against a federal government official for the violation of an individual's constitutional rights. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

31. *Andersen v. United States*, 1993 U.S. App. LEXIS 26681, at *4 (9th Cir. June 9, 1993).

32. *Id.* (brackets in original).

asked to argue in court for an interpretation of a statute that he or she believes contradicts the intent of Congress and promotes pollution. A lawyer for the Federal Communications Commission might be asked to defend a policy that limits access to the airwaves in a way she believes contravenes the First Amendment. Or a lawyer at the Civil Rights Division of the Justice Department may be forced to take a position that marks a retreat on civil rights. Government attorneys cannot expect their views to trump those of their superiors. But must they be personally forced take an assignment in violation of their conscience?³³ As we shall now see, sparing them this choice would merely accord them the respect given private attorneys and other employees and citizens in assorted situations.

II. THE PRIVATE ATTORNEY AND COURT APPOINTMENT

Private practitioners generally choose their own clients. There is one ostensible exception: The American Bar Association's Model Rules of Professional Conduct states that lawyers must accept court appointments absent good cause for declining.³⁴ However, good cause explicitly includes situations where "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client."³⁵

While the exception speaks in terms of harm to the client, courts generally do not require that an attorney demonstrate such harm in order to decline an appointment.³⁶ Thus, for example, in the context of a judicial bypass of parental notification of abortion, the United States Court of Appeals for the Seventh Circuit noted that a girl seeking a bypass would have to approach an attorney who might have moral or religious objections to abortion: "Presumably such an attorney would not accept the representation . . . and we would certainly expect an attorney who held such beliefs not to accept a court appointment."³⁷

In the U.S. Supreme Court case of *Mallard v. United States District Court for the Southern District of Iowa*,³⁸ an attorney refused a court appointment to represent an indigent litigant. The attorney argued that he lacked trial experience and taking the case "would compel him to violate

33. Respecting their right of conscience would not mean giving each attorney within each agency veto power over the decisions of the boss. If the boss disagrees with the subordinate's judgment, he can reassign the case. The issue is only whether the attorney should enjoy veto power over assignments by his superior that compromise his conscience.

34. MODEL RULES OF PROF'L CONDUCT R. 6.2 (1999).

35. *Id.* R. 6.2(c).

36. See Collett, *supra* note 1, at 640. ("[T]he rule clearly continues to recognize that lawyers are not ethically bound to accept every court appointment.")

37. *Ind. Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1137 (7th Cir. 1983).

38. 490 U.S. 296, 299 (1989).

his ethical obligation to take on only those cases he could handle competently”³⁹ The Court held that the attorney could not be compelled to take the case, basing its decision on the fact that the federal statute empowers courts only to “request” an attorney’s services.⁴⁰ In this context, the Court said something significant: “[S]omebody who frequently refuses another person’s requests might not win that person’s favor. A soldier who regularly fails to fulfill his superior’s requests might not rise in the ranks as rapidly as would someone who was more compliant.”⁴¹

This dicta suggests why protecting a government lawyer’s right of conscience would not destroy the effectiveness of government agencies (just as the freedom of attorneys to decline particular assignments has not destroyed the court appointment process). The government attorney who *frequently* finds assignments morally unpalatable is probably working in the wrong place, and will presumably realize as much.

The fact that private attorneys may refuse court appointments suggests the stark double standard between private and government attorneys. Whereas the private attorney can follow his conscience and decline to represent a client in *any* case (i.e., even in the case of court appointment),⁴² the government attorney enjoys the right to decline an assignment in *no* case.

The legal profession is so protective of a private attorney’s conscience that some courts and commentators oppose mandatory pro bono programs because they constitute “a forced expression of belief (in the value of pro bono causes) contrary to an individual’s conscience. . . .”⁴³ This argument may seem a stretch,⁴⁴ but it is taken seriously.⁴⁵ It is time

39. *Id.* at 300.

40. 28 U.S.C. § 1915(e)(1) (2000) (“The court may request an attorney to represent any person unable to afford counsel.”). Similarly, most state statutes do not compel acceptance of an assignment.

41. *Mallard*, 490 U.S. at 301.

42. See David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1039 (1995) (“[A] lawyer who believes that it would be morally wrong to lend her professional skill to a particular cause ought not to be forced to do so”).

43. Mary Coombs, *Your Money or Your Life: A Modest Proposal for Mandatory Pro Bono Services*, 3 B.U. PUB. INT. L.J. 215, 222 (1993).

44. Coombs finds the argument “more imaginative than serious,” *id.* at 223 n.20, and we agree. The case against mandatory pro bono is weak, because such programs leave lawyers free to decide what cases to take. Theoretically a lawyer might object to the very concept of pro bono, but such a view is entirely at odds with the ethos of the profession and the lawyer’s status as an officer of the court. See MODEL RULES OF PROF’L CONDUCT R. 6.1 (1999) (“A lawyer should aspire to render at least fifty (50) hours of pro bono publico legal services per year.”) and the accompanying comment (“Every lawyer . . . has a responsibility to provide legal services to those unable to pay.”).

45. See, e.g., Greg Stevens, Note, *Forcing Attorneys to Represent Indigent Civil Litigants: The Problems and Some Proposals*, 18 U. MICH. J.L. REFORM 767, 770 (1985) (arguing against uncompensated court appointments); David L. Shapiro, *The Enigma of the Lawyer’s Duty To Serve*, 55 N.Y.U. L. REV. 735, 765 (1980) (noting that mandatory pro bono may “end up being antagonistic to the values of some who are required to serve”).

to take seriously the far more persuasive case for accommodating a government attorney's right to refuse a particular assignment.

III. EMPLOYEE PROTECTION

The case for recognizing a right of conscience for government attorneys draws support from various circumstances in which legislatures and courts have directly or indirectly protected the consciences of employees.

A. THE WHISTLEBLOWER

The numerous federal and state statutes protecting whistleblowers⁴⁶ from retaliatory discharge provide a strong foundation for erecting a right of conscience for government lawyers.⁴⁷ On its face, the two situations may seem radically different: The whistleblower is discharged for reporting wrongdoing, not for declining an assignment. On careful inspection, however, the situations are closely analogous.

The whistleblower statutes encourage certain behavior that serves the public.⁴⁸ They also protect individuals' rights to conscience.⁴⁹ In terms of the latter, the rationale logically applies as much to attorneys faced with an unpalatable assignment as to whistleblowers.⁵⁰

The public policy question is more subtle. It obviously serves a public purpose for whistleblowers to report wrongdoing, which they feel far freer to do when given statutory protection. By contrast, it may be thought that no public policy goals would be advanced by permitting government lawyers to respect the dictates of their consciences. However, that is not the case. Declining an assignment makes a statement that can have an impact. If, for example, the lead district attorney finds that few of his attorneys will prosecute a "three strikes" case, he obtains a valuable piece of information that ought to be shared with the legislature. Also, protecting the right of conscience would enhance morale (above and beyond the fact that lawyers are unlikely to perform well on assignments they oppose). Government lawyers would feel more like

46. See WHISTLE BLOWING: THE REPORT OF THE CONFERENCE ON PROFESSIONAL RESPONSIBILITY vii (Ralph Nader et al. eds., 1972) (defining whistleblower as one "who, believing that the public interest overrides the interest of the organization he serves, publicly 'blows the whistle' if the organization is involved in corrupt, illegal, fraudulent, or harmful activity").

47. For discussion of many such statutes, see David Culp, *Whistleblowers: Corporate Anarchists or Heroes? Towards a Judicial Perspective*, 13 HOFSTRA LAB. & EMP. L.J. 109, 120-30 (1995).

48. See, e.g., *Nichols v. Metro. Ctr. for Indep. Living*, 50 F.3d 514, 517 (8th Cir. 1995) ("The whistleblower statute is intended to protect the public from unlawful employer conduct.").

49. See *Mgmt. Info. Techs. v. Alyeska Pipeline Serv. Co.*, 151 F.R.D. 478, 481 (D.D.C. 1993) (describing whistleblowers as "employees who speak out as a matter of conscience"); Chineson, *Bureaucrats with Conscience*, LEGAL TIMES, Apr. 17, 1989, at 50 (book review).

50. See Collett, *supra* note 1, at 649 ("[T]he ideal of amoral lawyering disregards the damage inflicted to the moral integrity of lawyers who are forced to advocate immoral actions.").

true public servants, not automatons.⁵¹ Finally, in the long term the perception of public service can only be strengthened if government lawyers enjoy a degree of discretion over their assignments rather than seeing themselves as hired guns.⁵²

Whistleblower statutes initially met much resistance on the ground that they would promote disloyalty.⁵³ Some might make the identical argument against a right to conscience for government attorneys. In each case, the premise is mistaken. To honor one's commitment to one's conscience and the public interest is not to act disloyally.⁵⁴

Whistleblower statutes arguably encourage insubordination by empowering a disgruntled employee to make public accusations without fear of adverse consequences.⁵⁵ By analogy, the government lawyer might falsely invoke the right of conscience to avoid assignments he deemed too difficult or unrewarding. But, in each case, there's less to this risk than meets the eye. The whistleblower risks being branded a troublemaker and looked upon askance. That serves as a strong deterrent to frivolous whistleblowing, so that "when an employee decides to disclose wrongdoing, the decision presumably is justified by the employee's sincere belief that the public interest outweighs all other ethical and personal considerations."⁵⁶ The identical rationale logically applies to the government attorney who resists an assignment.

So, too, protection of government whistleblowers was deemed a threat to efficiency.⁵⁷ But our society came to recognize that the benefits of protecting whistleblowers override that risk. In any case, the threat to efficiency is far less when an attorney simply declines an assignment than when an employee publicly challenges his superiors.

51. See Ugarte, *supra* note 14, at 276 ("It is only when lawyers recognize the duty to the common good, as well as the duty to the agency, that they avoid the pitfall of simply being the mouthpiece of the agency's administration.").

52. See Letter, *supra* note 9, at 1312 (government attorney seeking to "convey[] my pride in my work as a public servant and [thus] inspire[] more attorneys to serve similarly").

53. See *In re Frazier*, 1 M.S.P.B. 163, 180 (1979) (noting that "Congress expressed great concern that the whistleblower provisions not be abused by dissident employees who have no legitimate basis for disclosures, but rather are bent upon disruption or upon creating smoke screens to obscure their own wrongdoing.").

54. See Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 691 (1999) ("Whistleblowing is usually a loyal rather than a disloyal act."); Robert G. Vaughn, *Statutory Protection of Whistleblowers in the Federal Executive Branch*, 1982 U. ILL. L. REV. 615, 616 n.6 (1982) ("[W]histleblowers are often the most loyal employees.").

55. See *In re Frazier*, 1 M.S.P.B. at 187 (expressing this concern).

56. Lois A. Lofgren, *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees Who Disclose the Wrongdoing of Employers?*, 38 S.D. L. REV. 316, 317 (1993).

57. See generally Rosalie Berger Levinson, *Silencing Government Employee Whistleblowers in the Name of "Efficiency"*, 23 OHIO N.U. L. REV. 17 (1996).

Whereas whistleblower statutes and case law protect activity in the private as well as the public sector, several courts have recognized that they are especially important and appropriate in the public sector, where public service motivates participation and ought to guide conduct.⁵⁸ Likewise, the right of conscience is even more appropriate for government lawyers than private lawyers.

B. THE "PUBLIC POLICY EXCEPTION" TO AT-WILL EMPLOYMENT

The whistleblower statutes are part of a larger trend limiting the power of employers to discharge employees without justification.

Most employees, including many government attorneys, are employed "at-will"—they have no specific statutory protection against wrongful discharge.⁵⁹ Traditionally, an employer could discharge an at-will employee for any reason (or no reason), and the employee would have no recourse.⁶⁰ However, over the last few decades legislatures and courts have moved in a different direction.⁶¹ The whistleblower statutes discussed above are only one example. Many legislatures proscribe discharge based on various enumerated criteria⁶² and many courts permit an at-will employee to sue for wrongful discharge if the discharge is "contrary to a clear mandate of public policy."⁶³ This doctrine has been used to reverse discharges in various circumstances.⁶⁴

58. See Lofgren, *supra* note 56, at 330–32 (citing and discussing cases providing greater protection to public employees).

59. To be sure, federal government lawyers have certain procedural protections via the administrative law system. However, such protection is not available to many state and local government attorneys and offers only limited protection to federal government attorneys. See *infra* text accompanying notes 89–93.

60. See G. Richard Schell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 431, 445 n.64 (1993) ("[T]he traditional 'at will' employment contract, under which employees can be terminated at the discretion of the employer, was once so favored by judicial notions of public policy that it enjoyed constitutional status.").

61. See, e.g., Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1818 (1980) (discussing evolution of this trend).

62. See, e.g., Human Rights Act, D.C. CODE ANN. § 1-2501 (1992) (prohibiting discharge based on fifteen categories, including personal appearance, sexual orientation and political affiliation); FLA. STAT. Ch. 440.205 (2002) (prohibiting discharge in retaliation for filing workers compensation claim).

63. *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505, 512 (N.J. 1980) (seminal case discussing evolution of doctrine).

64. See, e.g., *Woodson v. AMF Leisureland Ctrs., Inc.*, 842 F.2d 699, 700–01 (3d Cir. 1988) (concerning an employee discharged for refusing to sell liquor to intoxicated patron); *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 896 (3d Cir. 1983) (concerning an employee discharged for refusing to participate in political lobbying); *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 880 (Ill. 1981) (concerning an employee discharged for assisting law enforcement authorities in criminal investigation of fellow employee); *O'Sullivan v. Mallon*, 390 A.2d 149, 150 (N. J. Super. Ct. Law Div. 1978) (concerning an employee discharged for refusing to perform a catheterization procedure without proper training).

Such protection springs from recognition that an employer's right to discharge is "restricted by the rights of employees and society"⁶⁵ and "[e]mployees should not be forced to choose between continuing employment and contravening public policy."⁶⁶ A person's employment is central to his "existence and dignity,"⁶⁷ and ought not be lightly taken away.

Some of the cases applying the public policy exception directly support the case for a government lawyer's right to conscience. For example, in *Kalman v. Grand Union Company*,⁶⁸ a pharmacist was discharged for protesting an unlawful action by his manager. The court held that his lawsuit could proceed because it alleged a discharge in violation of public policy.⁶⁹ Significantly, the court noted that the pharmacist's action was motivated by "his perception of his professional obligations."⁷⁰

While some courts have been reluctant to extend the protection of the public policy exception to attorneys,⁷¹ at least one court recognized that lawyers deserve *special* protection from wrongful discharge. In *Wieder v. Skala*,⁷² a law firm associate informed the firm's partners of a fellow-associate's perjurious conduct, and urged that the conduct be reported to the appropriate disciplinary committee. When he persisted, the firm discharged him, and he sued the firm for wrongful discharge. The court held:

We agree with plaintiff that in any hiring of an attorney as an associate to practice law with a firm there is implied an understanding so fundamental to the relationship and essential to its purpose as to require no expression: that both the associate and the firm in conducting the practice will do so in accordance with the ethical standards of the profession.⁷³

65. Cathryn C. Dakin, *Protecting Attorneys Against Wrongful Discharge: Extension of the Public Policy Exception*, 44 CASE. W. RES. L. REV. 1043, 1054 (1995).

66. *Id.* at 1044.

67. William B. Gould IV, *The Idea of the Job as Property in Contemporary America: The Legal and Collective Bargaining Framework*, 1986 BYU L. REV. 885, 892.

68. 443 A.2d 728 (N.J. Super. Ct. App. Div. 1982).

69. *Id.* at 731.

70. *Id.* at 730.

71. These cases usually involve a claim of wrongful discharge by a client, and occasionally by in-house counsel. See Dakin, *supra* note 65, at 1072-92 (1995) (discussing cases and arguing that public policy exception should protect attorneys). See also Thomas A. Kuczadja, *Self-Regulation, Socialization, and the Role of Model Rule 5.1*, 12 GEO. J. LEGAL ETHICS 119, 138 (1998) (citing cases both applying and refusing to apply public policy exception to lawyers).

72. 609 N.E.2d 105 (N.Y. 1992).

73. *Id.* at 108.

Although the case took place in the private sector, there is no reason to deny the same level of protection to government attorneys.⁷⁴ Surely neither they nor the government that employs them should be held to a less exacting ethical standard. Rather, as noted, where the legal profession is concerned the government is generally held to a higher standard.⁷⁵

To be sure, the attorney in *Skala* was not discharged for declining an assignment based on conscience. And at least one court has held that a professional's refusal to perform an assignment based on conscience and professional responsibility does not warrant protection. However, that oft-cited case, *Pierce v. Ortho Pharmaceutical Corp.*,⁷⁶ does not undercut recognition of a right to conscience for government attorneys.

In *Pierce*, a physician was discharged for declining work on the continuing development of a controversial drug.⁷⁷ She maintained that such work would violate the Hippocratic Oath.⁷⁸ The Supreme Court of New Jersey rejected her claim for wrongful discharge based on the public policy exception, noting that "[a]n employee at will who refuses to work for an employer in answer to a call of conscience should recognize that other employees and their employer might heed a different call."⁷⁹ To permit one employee to defeat the policy of the organization would create "chaos."⁸⁰

In the context of government attorneys, this analysis cuts the other way. Precisely because other employees may heed a different call, a particular attorney's invocation of a right to conscience does not jeopardize the implementation of the prescribed policy.⁸¹ What it does do is prevent the unnecessary and dispiriting coercion of a public-spirited professional.⁸²

Some courts have applied the public policy exception where an employee was fired for refusing to violate the United States Constitution or

74. Needless to say, no attorney has a right to government employment. See *Elrod v. Burns*, 427 U.S. 347, 360 (1976) ("[T]here is no right to a government benefit, such as public employment."). This is really another way of saying that government employees are at-will employees.

75. See *supra* text accompanying notes 13-21.

76. 417 A.2d 505 (1980).

77. The drug, loperamide, designed to treat diarrhea in infants, children, and elderly persons, contains saccharin. In light of potential harmful effects of saccharin, the physician believed it immoral to test the drug on children, especially since alternative drugs might soon be available. *Id.* at 506-07.

78. *Id.* at 505.

79. *Id.* at 514.

80. See *id.*

81. By contrast, the discharged employee in *Pierce* was "the only medical doctor on [the] project team." 417 A.2d at 506. The research in question would have ceased if the physician did not work on it, and "chaos would result if a single doctor engaged in research were allowed to determine, according to his or her individual conscience, whether a project should continue." *Id.* at 514.

82. Needless to say, the situation is somewhat different in the rare circumstance where a government lawyer is the only lawyer on staff capable of handling a particular matter.

a state constitution.⁸³ This application is particularly germane to the government attorney, who takes an oath to uphold the Constitution.⁸⁴ That oath suggests that one's ultimate loyalty is to the Constitution.⁸⁵ One should not be forced either to violate such an oath or to lose his employment.⁸⁶

It does not follow that every intra-agency dispute over the Constitution will or should end up in the courts. Rather, in the case of the government attorney given an assignment he or she regards as unconstitutional, a much easier solution presents itself: reassignment of the case to an attorney who can take it without consciously violating his oath and conscience.

Under current law, federal government attorneys do receive a degree of *procedural* protection from wrongful discharge. As "Schedule A" employees, they may protest a discharge to the Merit System Protection Board (MSPB).⁸⁷ However, the availability of this administrative option is currently of no consequence for the government attorney discharged because he followed his conscience and declined to follow orders: Without a rule or norm protecting an attorney's right of conscience, the MSPB will not find in his favor.⁸⁸ Under current law, discharging an employee who follows his conscience is considered justified: Unless the employee can show that the action he refused to undertake was blatantly improper, his act will be viewed as insubordination. Since these situations involve judgment calls, and the government body is accorded great deference by the MSPB, the protection afforded is minimal at best.⁸⁹

Likewise, internal protections afforded within certain government agencies are of limited utility. While agencies are bound by their internal

83. See, e.g., *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834 (Wis. 1983).

84. 5 U.S.C. § 3331 (2000).

85. See James R. Harvey, Note, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY L. REV. 1569, 1615 n.309 (1996) (noting that "[m]ost government officials are required to pledge their oath to support and defend the Constitution, not the president" or one's other superiors).

86. Indeed, forcing such a choice could run afoul of the doctrine that government cannot place "unconstitutional conditions" on employment. See Cynthia K.Y. Lee, *Freedom of Speech in the Public Workplace: A Comment on the Public Concern Requirement*, 76 CAL. L. REV. 1109, 1113-15 (1988) (discussing cases applying this doctrine).

87. See 5 U.S.C. § 2302 (2002); 5 C.F.R. § 213.3102(d).

88. See *Ryan v. U.S. Dep't of Justice*, 950 F.2d 458, 460-61 (7th Cir. 1991) (upholding discharge of FBI employee for "religiously motivated refusal to accept a single assignment" because the MSPB "accept[ed] the FBI's view," that tolerating such refusals, rooted in sincere religious belief, would "contribute to a breakdown in discipline" and "hinder the efficient operation of the FBI").

89. See *Fogg v. Ashcroft*, 254 F.3d 103, 112 (D.C. Cir. 2001) ("The MSPB reviews federal employer disciplinary actions deferentially . . . [a]nd we review the MSPB's assessment deferentially."); *Curran v. Dep't of Treasury*, 714 F.2d 913, 914 (9th Cir. 1983) (stating that agency must show only that its adverse action promotes efficiency of the service (citing 5 U.S.C. §§ 7701(c), 7513(a)) and "a rational nexus between the adverse action and the agency's articulated reason for the action").

provisions,⁹⁰ such provisions do not prohibit discharge of attorneys who decline an assignment that violates their conscience.⁹¹

In short, government attorneys need a new *substantive* protection—an acknowledged right to decline an assignment that violates their conscience. Such a right would dovetail with the “public policy” exception to at-will employment.

C. THE PUBLIC EMPLOYEE’S FREE SPEECH RIGHT

The Supreme Court provides protection to public employees discharged for exercising their First Amendment right to free speech.⁹² The Court recognizes that allowing public employees to voice their views can compromise “the efficiency of the public services”⁹³ performed by the government, but has held that the value of free speech about matters of public concern can trump this consideration.⁹⁴

Significantly, some commentators have criticized the Court for rooting the protection solely in the value to the public of discussion of matters of public concern, and ignoring another First Amendment value celebrated in other contexts: individual self-development or self-realization.⁹⁵ As one commentator cogently argues, “the ultimate goal of government in rendering [] public services is to further individual members of the public in their pursuit of self-fulfillment. It is unthinkable that the government, in its status as a public employer, should ignore the similar interests of its own employees.”⁹⁶

The imposition on the government lawyer forced to take an assignment that violates his conscience is even greater than the imposition on the public employee forced to keep quiet. The former is in the unique

90. See *Doe v. U.S. Dep’t of Justice*, 753 F.2d 1092, 1098 (D.C. Cir. 1985) (“Courts, of course, have long required agencies to abide by internal, procedural regulations concerning the dismissal of employees even when those regulations provide more protection than the Constitution or relevant civil service laws.”).

91. See WHISTLE BLOWING, *supra* note 46, at 199 (“Civil servants should be given more *substantive* rights. . . . Under the present civil service regime, the few rights that employees have are ‘procedural’: They have a right not to be fired without some sort of appeal, but once into the appellate process management can defend virtually any action on the grounds that it was ‘in the interest of the service.’ And management’s own view of the interest of the service is not subject to serious challenge.”) (emphasis added).

92. See *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

93. *Pickering*, 391 U.S. at 568.

94. See, e.g., *Connick*, 461 U.S. at 142.

95. See, e.g., Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court’s Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121, 127–28 (1996); Lee, *supra* note 86, at 1121; Risa L. Lieberwitz, *Freedom of Speech in Public Sector Employment: The Deconstitutionalization of the Public Sector Workplace*, 19 U.C. DAVIS L. REV. 597, 599 (1986).

96. Ma, *supra* note 95, at 128.

position of actively assisting a cause he believes unjust. That position is difficult for anyone, and all the more unfortunate when imposed on someone who sees public service as her calling.

D. THE MEDICAL "CONSCIENCE CLAUSE"

Many states have long had "conscience clauses" stipulating that physicians may suffer no penalty when they refuse to perform abortions.⁹⁷ After the Supreme Court recognized a constitutional right to abortion,⁹⁸ the United States Congress also enacted such a law.⁹⁹

States have extended similar protection to doctors in other situations, such as physician-assisted suicide,¹⁰⁰ and to other health care professionals as well.¹⁰¹ These conscience clauses derive from recognition that there are "professionals who have not only professional ethical obligations but personal moral convictions that may be implicated by their professional duties" and each "should be entitled to have his or her personal scruples respected to the extent that is reasonably practical."¹⁰² A number of commentators have called for expanding such protection to various health care professionals.¹⁰³

For reasons discussed above, government lawyers should be among the first, not the last, professionals to receive such protection.

E. THE GERMAN APPROACH

It may be thought that, in providing the various protections discussed above, American courts and legislatures have shown themselves extraordinarily solicitous of the conscience of employees. In fact, the protection is slim compared with that provided in Germany.

97. See, e.g., GA. CODE ANN. § 16-12-142 (1999) ("[A]ny person who states in writing an objection to any abortion or all abortions on moral or religious grounds shall not be required to participate in procedures which will result in such abortion; and the refusal of the person to participate therein shall not form the basis of any claim for damages on account of such refusal or for any disciplinary or re-criminatory action against the person.").

98. *Roe v. Wade*, 410 U.S. 113 (1973).

99. 42 U.S.C. § 300a-7 (1974).

100. For example, Oregon's Death With Dignity Act stipulates that a health care provider cannot be punished for refusing to participate in physician-assisted suicide. OR. REV. STAT. ANN. § 127.885 (Supp. 1998).

101. See William L. Allen & David B. Brushwood, *Pharmaceutically Assisted Death and the Pharmacists Right of Conscience*, 5 OHIO N.U. J. PHARMACY & L. 1, 16 (1996) ("Conscience clauses have been a way to implement a zone of protection for those whose substantive moral beliefs have rendered them incapable of participating in certain therapeutic services.").

102. *Id.*

103. See, e.g., *id.* at 2 (arguing that because pharmacists are health care providers sometimes placed in a morally difficult position, we need "assurance that the pharmacist's right of individual conscience is appropriately recognized"); Irene P. Loftus, *I Have a Conscience, Too: The Plight of Medical Personnel Confronting the Right to Die*, 65 NOTRE DAME L. REV. 699, 718 (1990) (calling for "more substantially certain protection for medical personnel who could not in good conscience participate in withdrawing nutrition and hydration" from patients).

The German Constitution contains a provision providing for freedom of conscience,¹⁰⁴ which has been construed to permit *all* employees to decline to perform a task they deem incompatible with their conscience.¹⁰⁵ The determination is left to the employee, who may not be discharged on account of its exercise.¹⁰⁶

While this broad right of conscience can pose difficulties of implementation,¹⁰⁷ it has hardly wreaked havoc on Germany's economy or society.¹⁰⁸

IV. CONSCIENCE-PROTECTION OUTSIDE THE EMPLOYMENT CONTEXT

Legislatures and courts have protected the right of conscience in areas outside the employment context that provide additional support for an analogous right for government attorneys.

A. THE FIRST AMENDMENT PROTECTION AGAINST COERCED EXPRESSION

The Supreme Court has held that the First Amendment prevents the government from forcing individuals to articulate or promote viewpoints with which they disagree. The paradigmatic cases are *West Virginia Board of Education v. Barnette*¹⁰⁹ and *Wooley v. Maynard*.¹¹⁰ In *Barnette* and *Maynard*, respectively, the Court struck down a statute requiring a compulsory flag salute and a statute requiring compulsory display of the state motto ("Live Free or Die") on license plates. These cases sought to protect "the sphere of intellect and spirit"¹¹¹ and "freedom of mind."¹¹² Some commentators characterize the protected right as one of "personhood"¹¹³ or "self-realization."¹¹⁴ Perhaps most tellingly, Chief Justice

104. Art. 4 GG.

105. See Paul F. Gerhart, *Employee Privacy Rights: Introduction and Overview*, 17 COMP. LAB. L.J. 1, 5-6 (1995).

106. See *id.*

107. See Manfred Weiss & Barbara Geck, *Worker Privacy in Germany*, 17 COMP. LAB. L.J. 75, 80 (1995) (noting that German courts have wrestled with "whether a distinction can be made between a 'reasonable conscience,' which would justify a refusal to perform certain work, and an 'unreasonable conscience,' which would be deemed irrelevant.").

108. It is obvious why Germany is especially protective of a right to conscience—in light of that country's history, the notion that one must follow all orders has a nasty resonance. But in America, too, blind obedience to government superiors merits a degree of scorn. See, e.g., *Jaffe v. U.S.*, 663 F.2d 1226, 1250 (3d Cir. 1981) (en banc) (Gibbons, J., dissenting) (referring mockingly to the idea of "encouraging unquestioned obedience" in the military context—where obedience is expected more than anywhere—as the "serviceman as automaton principle").

109. 319 U.S. 624 (1943).

110. 430 U.S. 705 (1977).

111. *Barnette*, 319 U.S. at 642; *Maynard*, 430 U.S. at 715 (quoting *Barnette*, 319 U.S. at 642).

112. *Barnette*, 319 U.S. at 637; *Maynard*, 430 U.S. at 714 (quoting *Barnette*, 319 U.S. at 637).

113. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 15.1-5, at 886-900 (1978).

114. See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

Rehnquist rightly characterized these cases as protecting "the constitutional interest of natural persons in freedom of conscience."¹¹⁵

Why not extend such protection to the government attorney asked to take a position which violates his or her conscience? Being forced to utter or display certain words is much less far-reaching than being forced to use one's professional skills to argue a case or otherwise take a position that can have a major impact on public policy. Whose conscience is compromised more—the private citizen forced to display a "Live Free or Die" message to which he objects or the government lawyer forced to argue in court a position he believes detrimental or even unconstitutional? The latter is in a position where his own professional success can produce a result he believes harmful to the public interest.

One might respond that the government employee can escape this burden merely by taking another job. However, the defendant in *Barnette* could have attended a private school and the defendant in *Maynard* could have moved to another state.¹¹⁶ The question is not whether the compulsory activity can be escaped. The question is whether we deem it proper to put a person in the position of leaving his job or violating his conscience.¹¹⁷ Absent some compelling reason, the answer is a resounding no.

B. THE CONSCIENTIOUS OBJECTOR

Another place where our society has shown sensitivity to the right of conscience is in exempting from military service those who conscientiously object.¹¹⁸ Federal law traditionally exempted from combat those who "by reason of religious training and belief [are] conscientiously opposed to participation in war."¹¹⁹

The statute defined religious belief as belief "in relation to a Supreme Being" and "does not include essentially political, sociological, or

115. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n. of Cal.*, 475 U.S. 1, 32 (1986) (Rehnquist, J., dissenting).

116. Indeed, in dissent in *Barnette*, Justice Frankfurter emphasized that anyone objecting to the compulsory pledge of allegiance could attend private school. See 319 U.S. at 656–58 (Frankfurter, J., dissenting). The majority was unmoved by the argument.

117. Nor can *Barnette* and *Maynard* be distinguished on the ground that these cases dealt with speech. The government attorney forced to take a certain position will, inevitably, be forced to verbalize that position—in court papers and at oral argument.

118. See Spencer E. Davis, Jr., Comment, *Constitutional Right or Legislative Grace? The Status of Conscientious Objection Exemptions*, 19 FLA. ST. U.L. REV. 191, 192 (1991) ("[E]xemptions, in one form or another, for conscientious objectors have been included in every federal statutory scheme authorizing compulsory military service in the United States since the Civil War.").

119. 50 U.S.C. app. § 456(j) (2000).

philosophical views or a merely personal code."¹²⁰ However, in cases that arose during the Vietnam War, the Supreme Court essentially broadened the statute to encompass non-religious conscientious objection.¹²¹ Seeking to avoid Establishment Clause problems, the Court reversed the convictions of conscientious objectors who explicitly disavowed belief in a Supreme Being. Through interpretive acrobatics, the Court in *United States v. Seeger* read "religious" belief to encompass any "sincere and meaningful belief which occupies in [the objector's] life . . . a place parallel to that filled by [] God" in the life of religious objectors.¹²²

In *Welsh v. United States*, Justice Harlan in concurrence and Justice White in dissent pointed out that the *Seeger* Court was playing games. As White observed, despite a tortured disclaimer the Court contradicted the statute's prohibition on draft exemptions based on "philosophy, history, and sociology."¹²³ Justice Harlan agreed, but he argued that the Court could have upheld the statute anyway, by rejecting any reference to religion: "The common denominator must be the intensity of moral conviction with which a belief is held," even if it is "guided [only] by personal ethical considerations."¹²⁴ Such an approach, Harlan noted, accords with our country's "recognition to what is in a diverse and 'open' society, the important value of reconciling individuality of belief with practical exigencies whenever possible."¹²⁵

The two-word qualification at the end is important—our society cannot be sustained if we exempt from the requirements of law anyone with a strong moral objection to a law.¹²⁶ At the same time, when someone's strong moral views demand withholding her personal participation in a government activity, and harm no one else, we should honor it "whenever possible." There is no reason to limit this principle to combat: Other activities violate a person's deeply held beliefs. A society committed to individual rights should honor such beliefs absent a significant interest in compelling compliance.¹²⁷

120. *Id.* The statute has been amended to strike out any reference to a supreme being, Pub. L. 90-40, § 1(7) (1967), but that was not the case when the Supreme Court addressed it in *United States v. Seeger*, 380 U.S. 163 (1965), discussed *infra* text accompanying notes 123-24.

121. *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163 (1965).

122. *Seeger*, 380 U.S. at 176.

123. *Welsh*, 398 U.S. at 367 (White, J., dissenting).

124. *Id.* at 358-59.

125. *Id.* at 365-66.

126. *See, e.g.*, *United States v. Lee*, 455 U.S. 252, 260 (1982) ("The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief."); *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (permitting citizens to disobey all laws that violate their conscience would "in effect [be] to permit every citizen to become a law unto himself").

127. Thus, the Supreme Court has held that governmental actions that substantially burden a religious practice must be justified by a compelling government interest. *See, e.g.*, *Sherbert v. Verner*, 374

Where the government lawyer wishes to avoid an assignment that clashes with his or her conception of public service, both sides of the equation—the individual interest and the state interest—counsel in favor of permitting his resistance. Professionals who answer the call of public service are the last people who should be forced to violate their conception of the public good. Why should we force them to do something they believe immoral more than we would a reluctant soldier who has not shown any particular commitment to the public interest?

Moreover, the state interest in requiring every government lawyer to accept every assignment is slight. Whereas there is some risk that war-time conscientious objector status will be abused, the likelihood of abuse of a government lawyer's right of conscience is comparatively tiny. After all, for obvious reasons many people want no part of military service. By contrast, the government attorney *does* want to represent the government. We strengthen our commitment to our ideals if we honor his or her conscience on those occasions when it would be compromised by a particular assignment.

V. A MODEST PROPOSAL

As the above should make clear, protecting a government attorney's right of conscience would not involve creation of a new theory of entitlement. It merely seeks to extend a time-honored right to a most deserving group: those who opt for a career of public service within a noble profession.

The proposed right should be explicitly protected by statute. That would provide the maximum protection for government lawyers. But the legal profession need not await a statute. Rather, the American Bar Association and state bar associations can adopt an appropriate canon of ethics.¹²⁸ If such a canon existed, superiors would be more respectful of attorneys who declined an assignment and courts might provide recourse where such respect was lacking.¹²⁹ Courts may well find it unreasonable

U.S. 398, 402–03 (1963). In *Employment Division v. Smith*, 494 U.S. 872 (1990), which upheld a state statute banning peyote, the Court seemed to pull back from that position. However, the Court's rejection of the "compelling governmental interest" test was limited to statutes imposing "an across-the-board criminal prohibition on a particular form of conduct." *Id.* at 884. The disruption to society from conscience-based exemptions from the criminal law is obviously far greater than a government lawyer's conscience-based exemption to a particular assignment.

128. See Ugarte, *supra* note 14, at 273 ("[N]either the Model Rules of Professional Conduct (Model Rules), nor the Model Code of Professional Responsibility (Model Code) are very helpful. To the extent that either set of rules addresses the government lawyer at all, only vague guidance is offered.")

129. See Dakin, *supra* note 65, at 1062 n.104 (summarizing cases that hold ethical codes can sometimes establish public policy).

for the government to discharge a public servant for adhering to the explicit ethic of her profession.¹³⁰

The canon of ethics should be drafted in a way that does not give every attorney veto power over every assignment.¹³¹ The following proposed language might fit the bill: "A government lawyer may decline an assignment if he believes it will force him to act unlawfully or otherwise violate his oath of office or conscience."

It is highly doubtful that such a canon of ethics would significantly impede government efficiency. The proposed language sets the bar for declining an assignment reasonably high, and, as we have seen in the various other areas where an employee's or citizen's conscience is protected, there is a built-in disincentive to claim such a right too casually.

Any fear that the proposed right of conscience would be abused, and the government significantly disrupted, should be alleviated by the various analogies canvassed above. Germany has not suffered because all employees have a right of conscience,¹³² just as America has not suffered because of respect for the conscience of citizens in assorted situations.

The advantages of the proposed right of conscience should be clear. Then-Chief Justice Burger lamented that the notion of lawyers as officers of the court, "a significant feature of the lawyer's role in the common law . . . has sustained some erosion over the years at the hands of cynics who view the lawyer much as the 'hired gun' of the Old West."¹³³ But, according to the Chief Justice, "the overwhelming proportion of the legal profession rejects [this] denigrated role of the advocate. . . ."¹³⁴ Instead, he argued, the "very independence of the lawyer . . . is what makes law a profession, something apart from trades and vocations in which obligations of duty and conscience play a lesser part."¹³⁵

The Chief Justice was referring to the attorney in private practice. There is no reason a government lawyer should be more of a hired gun, and have less of an obligation of duty and conscience than an attorney in private practice. One would expect the opposite. And the proposed right of conscience would enhance the utility to society of government attor-

130. The importance of such a canon of ethics is illustrated by *Pierce v. Ortho Pharmaceutical Corp.*, 417 A.2d 505 (1980), discussed *supra* text accompanying notes 76-80. In upholding the discharge of a physician who refused to participate in research she considered unethical, the court noted that the physician failed to show that she acted in accordance with "the principles of ethics of the American Medical Association." *Id.* at 508.

131. See Ugarte, *supra* note 14, at 278-79 ("At the very least, serious consideration should be given to crafting rules of professional responsibility that provide more guidance to those who have chosen government employment over the private sector.").

132. See *supra* note 108.

133. *In re Griffiths*, 413 U.S. 717, 731 (1973) (Burger, C.J., dissenting).

134. *Id.* at 732.

135. *Id.*

neys both by reminding them of their paramount obligation to serve the public interest and by liberating them to do so in more situations.

Another Supreme Court Justice, Hugo L. Black, opined that “[t]o force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it.”¹³⁶ It is worse still to create government-fearing automatons out of those members of the bar who choose public service.¹³⁷

CONCLUSION

Our society has shown sensitivity to the call of individual conscience. We respect the conscience of draftees who oppose war, physicians who oppose abortion, employees who oppose their superiors’ misconduct, and citizens who oppose government dogma (e.g., on license plates and in the classroom). It is time to respect the conscience of those officers of the court in the forefront of the fight to protect the rights of the rest of us.

136. *In re Anastaplo*, 366 U.S. 82, 115–16 (1961) (Black, J., dissenting).

137. In the words of Harvard law professor and Watergate special prosecutor Archibald Cox, “[t]he lawyer is not always right about what conscience or a sense of public responsibility require. On the other hand, he will soon lose both his independence and his influence if he is always ready to devote his skill and legal knowledge to any enterprise not involving crime.” Address before the Section of Tort and Insurance Practice of the American Bar Association (ABA) at the ABA’s Annual Convention in Atlanta (July 31, 1983), *LEGAL TIMES*, Aug. 15, 1983, at 6.
